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In The

Supreme Court of the United States

October Term, 1978

No. 78-356

SAC & FOX TRIBE OF THE MISSISSIPPI IN IOWA,

Petitioner,

vs.

LES LICKLIDER, Chairman, Iowa State Conservation Commission; THOMAS A. BATES; JIM D. BIXLER; JOHN G. LINK; CAROLYN T. LUMBARD; HERBERT T. REED; and JOHN THOMPSON, members of the State Conservation Commission; FRED A. PRIEWERT, Executive Director, State Conservation Commission; and KENNETH KAKAC, Superintendent of Law Enforcement, Hunting and Fishing,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND CONDITIONAL PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

The opinion of the District Court is not reported; the Court of Appeals decision is reported at 576 F. 2d 145 (8th Cir. 1978).

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QUESTIONS PRESENTED FOR REVIEW

Whether Iowa ever ceded jurisdiction over hunting and fishing on the Tama Indian Settlement.

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STATEMENT OF THE CASE

The Respondents would modify the petitioner's statement of the facts of this case in the following respects.

1. Respondents do not accept as a matter of fact that some members of the Sac and Fox tribe remained in Iowa following the 1842 treaty.[1] The Eighth Circuit noted that neither they nor the district court considered resolution of that issue essential to the determination of the case (Footnote 3, Appendix to Petitioner's Brief, p. 9A, 10A). Respondents never conceded that such a remnant population existed and continue to assert that none in fact did.

2. It remains at issue whether the federal Indian agent who held the 280 acres of land in trust did so by authorization of Congress or the Bureau of Indian Affairs.

3. Respondents have at all times held that the Tama Settlement is not a "reservation". Respondents will fully treat this issue in the argument of this brief.

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1 Treaty of October 11, 1842, 7 Stat. 596.

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REASONS FOR NOT GRANTING THE PETITION FOR WRIT OF CERTIORARI

The conclusion of the Court below was correct.

The treaties between the tribe and the United States, the actions of the United States Congress and the actions of the Iowa Legislature evidence jurisdiction of the State of Iowa over hunting and fishing on the Tama Indian Settlement.

Of the numerous transactions between the United States, the Sac and Fox Tribe and Iowa, there are three critical events that determine the resolution of this case. The first is the Treaty of October 11, 1842, 7 Stat. 596. By that treaty, the confederated tribes agreed to cede all Iowa lands to the United States and remove to the Kansas territory. The Eighth Circuit correctly held that by said treaty, the tribes relinquished aboriginal rights of hunting and fishing. *Cf.,* F. Cohen, *Handbook of Federal Indian Law,* pp. 311-312 (U. N. Mex. Press ed. 1971).

Second, in 1896 Iowa tendered exclusive jurisdiction over the Tribe and the lands held in trust for them to the United States, with the following exception:

> Nothing contained in this act shall be so construed as to prevent on any of the lands referred to in this act the service of any judicial process issued by or returnable to any court of this state or judge thereof, or to prevent such courts from exercising jurisdiction of crimes against the laws of Iowa committed thereon either by said Indians or others, or of such crimes committed by said Indians in any part of this state * * *.

Acts of the 26th Iowa General Assembly, ch. 110, February 14, 1896. The United States accepted this tender, stating in part:

> That the United States hereby accepts and assumes jurisdiction over the Sac and Fox Indians of Tama County, in the State of Iowa, and of their lands in said State, as tendered to the United States by the act of the legislature of said State passed on the sixteenth day of January, eighteen hundred and ninety-six, subject to the limitations therein contained * * *.

Act of June 10, 1896, ch. 398, 29 Stat. 321, 331.

Third, in 1948, Congress conferred concurrent criminal jurisdiction on the state over offenses committed "by or against Indians on the Sac and Fox Indian Reservation" located in Iowa. Act of June 30, 1948, ch. 759, 62 Stat. 1161.

As indicated above, the 1842 Treaty terminated the aboriginal rights of the tribe in Iowa. The Eighth Circuit went on to correctly hold that these rights were never rejuvenated by subsequent events. The Petitioner's argument fails to establish that they ever were.

Petitioner contends that since 1865, the settlement area has been treated like any other Indian Reservation. Closer examination reveals that such is not the case. In 1867, Congress approved of paying annuities arising under the 1842 Treaty to the Tama Indians. That approval was qualified by Congress:

> . . . so long as they are peaceful and have the assent of the government of Iowa to reside in the state.

Act of March 2, 1867, ch. 173, 14 Stat. 492, 507 (1868).

Such a qualification is totally inconsistent with federal control of Indian Reservations and Indian aboriginal freedom.

The Petitioner contends that the tender of exclusive jurisdiction over the Sac and Fox Tribe and the land held in trust for the tribe by Iowa in 1896[2] and the acceptance of that tender and its conditions by Congress[3] did not confer hunting and fishing jurisdiction in Iowa. Petitioner's Brief, p. 6. The facts fail to show that Iowa ever lost jurisdiction over hunting and fishing and enforcement of her laws on land held by her governor between 1842 and 1896, thus not requiring anything to be conferred on Iowa at that time. As the Iowa Legislative Act was worded to be an exclusive tender, if the state desired to retain any jurisdiction, it was necessary to reserve it. That was done by general language retaining jurisdiction over crimes against the laws of Iowa and such language was accepted by Congress. Violations of Iowa's game laws are criminal acts which can result in a fine or imprisonment. Iowa Code, 1977, § 109.32, § 109.119. By the plain wording of the legislative and Congressional actions in 1896, Iowa has jurisdiction to regulate hunting and fishing on the Tama tract.

Petitioner relies heavily upon a line of cases arising at the turn of the century which involved attempts by the Indian agent to enforce state compulsory school attendance laws.[4] Petitioner misconstrues the holding of *Peters*

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2 Act of the 26th G. A., ch. 110, February 14, 1896.

3 Act of June 10, 1896, ch. 398, 29 Stat. 321, 331.

4 *In re Lelah-Puc-Ka-Chee*, 98 F. 429 (N. D. Iowa 1899); *Peters v. Malin*, 104 F. 849 (N. D. Iowa 1900); *Y-Ta-Tah-Wah v. Rebock*, 105 F. 257 (N. D. Iowa 1900); *Peters v. Malin*, 111 F. 244 (N. D. Iowa 1901).

v. Malin, 111 F. 244 (N. D. Iowa 1901) in stating that the case held that Iowa had nothing to reserve. That case states, *supra* at 255:

> The State of Iowa has the right to exercise its police powers for the protection of its own citizens, but it cannot regulate the affairs of tribal Indians in their relations to each other, . . .

Nothing in the *Peters* case, *supra,* denies Iowa's jurisdiction herein.

Petitioner's argument that the 1948 statute did not confer jurisdiction fails for the same reasons. In *Youngbear v. Brewer,* 549 F. 2d 74 (8th Cir. 1977), the court held that Congress granted general jurisdiction to Iowa over crimes committed by or against Indians on the Tama tract, but excepted the ten major crimes defined by 18 U. S. C. § 1153 for exclusive federal jurisdiction. Legislative history of the 1948 statute sheds some light on the reasons Congress was acting again in regard to jurisdiction of the Tama Indians. It seems that the *Peters v. Malin* case, *supra,* had caused confusion as to the scope of Iowa's jurisdiction, at least as to those crimes by Indians against other Indians. A letter from Mr. Peyton Ford, then assistant to the Attorney General of the United States, indicates that the need for the 1948 bill was due to a breakdown in law enforcement on the Tama Settlement. H. R. Rep. No. 2536 at 3, 80th Cong., 2d Sess. (1948). In relevant part, it states:

> . . . [T]he State of Iowa by Act of February 14, 1896 (Iowa laws 1896-97, p. 114), ceded exclusive jurisdiction to the United States over the Indians and the lands included in the Sac and Fox Indian Reservation, but reserved jurisdiction in section 3 of the act over crimes against the laws of Iowa committed on the reservation by Indians and others. This cession of jurisdiction was accepted by Congress by the act of June 10, 1896 (29 Stat. 331). In construing this act of cession, the case of Peters v. Malin (111 Fed. 244), held that the reservation of jurisdiction set forth in section 3 did not subject such Indians to the criminal laws of the States, except for offenses committed against white persons, nor did it reserve to the State any jurisdiction or control over the domestic affairs or relations of the Indians. While there may be some question as to whether a State cession statute can limit Federal jurisdiction over tribal Indians, it appears clear that the jurisdiction of offenses committed by Indians against other Indians on the Sac and Fox Indian Reservation is in the Federal and not the State court.

It cannot be said that the two actions by Congress are contradictory under the circumstances.

Petitioner makes several attempts to show that Iowa jurisdiction over hunting and fishing is improper. Iowa is not subject to the confines of Public Law 280, 67 Stat. 588, as amended, 18 U. S. C. § 1162 which was applicable in the case of *Menominee Tribe of Indians v. United States,* 391 U. S. 404 (1968). Also, *Youngbear v. Brewer, supra,* did not specifically deal with 18 U. S. C. §§ 1164, 1165. Petitioner's contention that a dichotomy of federal jurisdiction over non-Indians and state jurisdiction over Indians who violate these sections misreads the purpose of statutes designed to protect Indian possessory rights. It was held in *Donahue v. California Justice Court for Klamath Trinity Judicial Dist.,* 93 Cal. Rptr. 310, 15 C. A. 3d 557 (1971), *cert. denied,* 404 U. S. 909 (1971), that California was not prohibited by past or present federal law from applying its fish and game laws to non-tribal In-

dians or others who went on Indian Reservation without authorization.

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CONDITIONAL PETITION FOR WRIT OF CERTIORARI

Respondent respectfully petitions the Court that if Petitioner's writ is granted, this conditional writ be granted Petitioner to consider all issues involved in the case including whether the Tama Settlement area is a "Reservation".

The Eighth Circuit held that while the Tama Settlement was not expressly designated a reservation, the manner in which the federal government dealt with the area caused the creation of a "de facto" reservation. Petitioner's Brief, p. 13a. This concept is in direct conflict with established principles of Indian law. 42 C. J. S. *Indians* § 29 reads:

> An Indian reservation is a part of the public domain set apart by proper authority for the use and occupation of a tribe or tribes of Indians. It may be set apart by an act of Congress, by treaty, or by executive order, but it cannot be custom or prescription.

The case of *Sioux Tribe of Indians v. United States,* 94 Ct. Cl. 150, 170, aff'd 316 U. S. 317 (1942) states:

> There are three kinds of Indian Reservations: those which were created by treaties previous to 1871; those which have been created by acts of Congress since 1871; and those made by Executive Orders whereby the President has set apart public lands for use of the Indians in order to keep them within a certain territory.

There has been no such formal dedication of the Tama Settlement.

The Eighth Circuit relied upon *Minnesota v. Hitchcock,* 185 U. S. 373, 390 (1902) to hold that no formal action is necessary to create a reservation. Based upon the relations between the United States and the Sac and Fox Tribe, the Eighth Circuit concluded that a de facto reservation existed.

Respondent requests that the Court examine these apparent conflicting decisions if they grant the Petitioner's petition for writ of certiorari.

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CONCLUSION

It is respectfully submitted that the Petition for Writ of Certiorari should be denied. Alternatively, if the Petition is granted, the Court should grant Respondents' Conditional Petition for Writ of Certiorari to consider the issue of whether the Tama Settlement is a reservation.

Respectfully submitted,

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